



MEDIATION



MEDIATION & Settlement Conferences

A Practical View From the Plaintiff's Perspective

BY DEV K. SETHI

An overwhelming number of civil cases filed in Arizona resolve before trial. Over the last 20 years, we have seen an ever-increasing number of those cases settling in mediation or settlement conference presided over by an active or retired judge with a special interest and knack for establishing common ground in disputes, or by practitioners whose practices include serving as a mediator.

Arizona state courts have recognized the vital role mediations and settlement conferences play in the life of a lawsuit. The relatively recent addition of Arizona Rule of Civil Procedure 16(g), which requires parties to meet and confer, and then report, on the issue of ADR and the increasing success of the Pima County Superior Court's mediation service are examples of the growing formal role that mediation is taking in our practices.¹

Here are some thoughts on how the process plays out, and what to expect, from the plaintiff's perspective.

When to Mediate

Anytime. Seriously. Anytime.

John F. Kennedy said, "Let us never negotiate out of fear, but let us never fear to negotiate." Granted, those words were spo-

ken in a different context, but the upshot is the same. The days of suspecting insecurity in your opponent when he or she suggested going to a settlement conference are thankfully over. The cost of litigation, the uncertainty of a jury trial, and the practical realization that most cases will eventually settle have led to a new paradigm. Talking about settlement—even early in the life of a case—is no longer viewed as a sign of weakness.

It is no impediment to settlement that certain depositions—even expert depositions—have yet to be completed. The reality is that both sides of a particular dispute are likely pretty familiar with their opponent's position and can predict, with relative particularity, what the counters to their own positions will be.

Of course, you must take each case on an individual basis and analyze the needs and strategy necessary to do best by the client. But you should not worry that having settlement discussions or broaching the thought of a settlement conference telegraphs anything negative.

Who Should Mediate

The choices here are endless. Everybody wants to be a mediator these days. It's hip. Before picking a name, you must do your

due diligence. First, you need to decide whether you are going to use a court-provided (free) mediation service or do private mediation. There are pros and cons to both.

There is certainly a cost savings with court-provided mediation, and the fact that the mediator is a judge or judge *pro tem* carries weight with the parties.

On the other hand, because parties have not paid for the process, there may be a perceived lack of investment. Without some skin in the game, the parties may be more inclined to walk away when things get difficult. In addition, because the court-provided mediators are not mediating day-in-and-day-out, have exceptionally busy schedules doing things other than settling cases, and are not dependent on their track record for future income, they may be less effective than private mediators.

On the private side of things, these mediations are usually relatively expensive: \$250 to \$400 an hour appears to be the going rate for mediators. Private mediators, the ones in demand, are often hard to schedule and must be booked months in advance. But they are focused on their task, take it personally when cases don't settle and are often—though not always—more creative and assertive in resolving cases.

When thinking about whom to use in a particular case, you must have some understanding of your own client's needs and motivations. This is especially true on the plaintiff's side, where your clients are typically one-time players in the system.

Mediation denies clients one of the key needs they have when they embark in a legal dispute—having their day in court. Some clients need an opportunity to vent and be heard. In that respect, an empathetic mediator will be more productive for you than a cut-and-dried negotiator. On the other hand, you may need someone who can cut to the quick without a lot of peripheral considerations.

In my opinion, regardless of the needs of your client, you need a mediator who is more than a messenger simply carrying numbers back and forth between caucus rooms. The neutral third party should bring to the table some objectivity and urgency to settle.

I do not believe that there are mediators—at least mediators who do it for any appreciable time—who are plaintiff oriented or defense oriented. I do, however, think there are mediators who are very tenacious and have very large egos. These mediators do not like to see cases leave their office unresolved. They often take it upon themselves to get on the phone and talk to people up the authority chain of command or have very direct, heart-to-heart conversations with individual participants in the litigation.

I suspect some of the plaintiff- or defense-biased anecdotes we hear come from folks on one side or the other of these cases. No mediator is going to force a party to settle when they otherwise don't have it in mind. But a quality mediator can convince parties to look at issues from different perspectives and can change preconceived opinions.

Whomever you select, your objective should be to present a position persuasive enough to allow the mediator to change preconceived notions in the other room.

For my money, I think a successful mediator needs to have a big ego. They need not wear it on their sleeves, but these cases are difficult to resolve. You have emotional issues, injuries, people's behavior and people's recommendations all being called into question and scrutinized. It is difficult to get folks to move off of their preconceived positions, and a mediator must have the confidence and force of will to keep discussions going.

Finally, there are lots of mediator choices in the marketplace. Ask around and do not be afraid to try someone new—especially if your tried and true mediators seem to be becoming less effective.

Where to Mediate

The location of a mediation is often an early stumbling block in discussions.

If you cannot agree on where you are going to sit down and talk about settling a case, chances are you are going to have a very difficult time actually settling that case. If you run into this problem, you should pay special attention to the section above: You are going to need a very effective mediator.

My philosophy: Pick an office that has enough conference room space for all the folks who are going to attend, has a speaker phone, access to a fax machine, cold drinks, hot coffee, and, maybe, some snacks.

I suspect everybody's preference is to mediate in their own office, where they can control the environment and have access to their computers and fax machines. But in the end, I think you can accomplish anything you need to anywhere.

Preparing Yourself for Mediation

One of the biggest complaints mediators express is that lawyers are not adequately prepared for mediation. With the vast majority of cases now settling, and settling at mediation, you should devote a substantial amount of time to your position paper and prepare yourself for the process. You must have a complete command of the facts and the law surrounding the claims you are bringing. You must be aware of the procedural posture of your case: pending or anticipated motion, discovery status, upcoming deadlines. A mediation is not the time to get caught short on issues in your case. Your mediator is going to be relying on you to provide ammunition to get movement from the other side. Give it to him or her.

In addition to the factual and legal issues in your case, settling a case from the plaintiff's perspective often involves coordinating many moving parts.

Liens

Health care liens are one of the most bedeviling facets of a plaintiff's personal injury practice. The rules are ever changing. Whether it is a worker's

compensation lien, an ERISA-based health care plan lien, AHCCCS, or a balance bill lien, the settlement number you obtain is going to be significantly affected in most cases by repayment obligations.

You must review the most recent law on the issue before any settlement conference. This law changes with increasing regularity. For example, within the last year, two very significant cases have dramatically changed the landscape and affected what we must consider with regard to liens.² If you don't fully appreciate the liens picture, you can't make sound and informed settlement recommendations.

It is good practice to have a full understanding of all the potential liens that must be addressed. I also like to inform contacts at all the various lienholders that the settlement conference is scheduled and make sure that they will be available by phone in case negotiations need to take place between my clients and the lienholders in order to get the deal done.

Settlement Agreements, Confidentiality and Tax Consequences

As a general proposition, settlement funds for personal injury are not considered taxable income. However, it is becoming popular for defendants to insist upon confidentiality provisions in settlement agreements. This is especially true in medical malpractice and products liability cases. Beware a relatively recent tax case involving former NBA star Dennis Rodman. *Amos v. Commissioner of Internal Revenue*.³ If you don't appreciate the concerns raised in this case, your client could get hit with a significant tax surprise.

Amos was assaulted by Dennis Rodman while photographing a Chicago Bulls basketball game. Amos brought and settled a personal injury lawsuit for a significant amount of money. In the subsequent tax case, the court found that the dominant reason that Rodman paid the settlement amount was to compensate Amos for alleged physical injuries arising from the incident, but the court also found that the settlement was paid in consideration for a confidentiality agreement. Monies paid for

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the confidential treatment of a settlement qualify as taxable income. In the *Amos* case, the court allocated 20 percent of the settlement proceeds as consideration for secrecy and allocated those funds to Mr. Amos' taxable income.

If you suspect a confidentiality provision is going to be a term of settlement, you should take steps to protect the true nature of the money changing hands. You have one of two options to consider.

Option one, assign a *de minimis* dollar amount as consideration for the confidentiality. This is the proverbial peppercorn from first-year contracts class. The amount earmarked as consideration for confidentiality will, of course, be considered taxable income, but you will also have evidence of a deliberate thought process regarding allocation of consideration for the confidentiality provision and should be able to head off a claim that a larger percentage of the settlement was actually paid for silence.

Option two, which I think is more effective, is to insist on reciprocal promises of confidentiality. That way, there is no mistaking that the only consideration being given by the defendant for your client's promise to keep the settlement confidential is the defendant's reciprocal promise.

Structured Settlements

On cases involving significant sums of money and in cases involving minors, you may wish to consider the appropriateness of a structured settlement or annuity. It is an even bet that the defendants will show up at the settlement conference with a structured settlement broker in their room to run numbers and present them to you. I suggest always having your own structured settlement professional in your room with you and your clients. There are several reasons for doing this, including your own professional liability and the ability to verify the numbers and rates being presented by the defense. Often, the defense structure person has an obligation to a particular company, and his singular interest is not maximizing your client's recovery. Having your own professional on your team also allows you to change the variables and analyze the true costs and benefit of a structured settlement. Your clients may not choose to go this way, but it's nice to have someone on your team analyzing different scenarios and answering specific questions for the clients.

Having your own structured settlement adviser assures you are getting the best numbers from the most stable companies.

Have Your Experts Available

Often questions or points will be raised by the mediator or the defense that are better suited to your experts. If you have your experts on call and available by telephone on the mediation date, you can quickly and effectively respond. This is a great strategy that deflates the "What do they say about X!?" approach. If you are posed with some question that the other side says is impeding further discussions, get your expert on the phone and figure out the answer. Once you have answered the question, you have the upper hand.

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Settlement Approval

If your client is a minor or someone with a guardianship or conservatorship, you must have your case approved by the Probate Court. This can be a lengthy process that requires a significant amount of paperwork. If you have multiple claimants to a single body of money and apportionment is an issue, you also may need to have the proposed settlement and any apportionment decisions vetted by a special master. You should begin thinking about these issues before you go to settlement conference—not after.

Preparing Your Clients for Mediation

From the minute your clients walk into your office with a plaintiff's case, they are think-

ing about the value of their case. In the end, that boils down to the net amount in their pockets at the end of the day. You, no doubt, have had the experience of clients in your office asking you what their case is worth. You must answer those questions as fairly and thoughtfully as possible. You must also prepare your clients for the fluid nature of a settlement conference. Clients who go into a settlement conference believing that their view of the case is the only view will be disappointed and difficult to deal with. You must lay the groundwork and prime your clients with the understanding that a settlement conference is a give-and-take and that to resolve the case and successfully negotiate a settlement, a compromised result will have to be reached.

It's also important to prepare your client for the increasingly common—and frustrating—outcome of an initial settlement conference: no settlement.

The Settlement Memorandum

Different people have different philosophies on whether to present the settlement memorandum to the defense. I typically do not.

Instead, I send the defendants a demand letter. The settlement conference memorandum is certainly based, in large part, on the demand letter, but it also contains much more candid and confidential analysis that I need to share with the mediator. Mediators are concerned with the procedural posture of the case, the work that needs to be done going forward and counsel's honest thoughts about the pros and cons of your case. You may prefer not to share this information with your adversary. Not sharing it with the mediator, though, frustrates his or her ability to help you get the case settled.

As I mentioned previously, you want to convince the mediator that your view of the world is correct so that he or she will work to show it to the other side. My best tip for doing that is to make the mediator's preparation as easy as possible. Remember that you have one day, or perhaps just half a day, of the mediator's time. Everything surrounding your slot is already devoted to other obligations. Give your mediator the necessary information in a digestible and easy-to-understand form. Use visuals, charts and exhibits just like you would at trial. The less struggle your mediator has

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understanding your case, the more common-sense appeal it will have, and the better off you and your client will be.

The Day of the Conference

Being a plaintiff's lawyer in a settlement conference requires walking a thin line between being your client's counselor and advocate. You must advocate zealously enough with the mediator to help him or her see things through your lens of the case. At the same time, you do not want to create unrealistic expectations in your client's mind. You also need to be able to step back from your role as an advocate and have honest talks with your clients about the pros and cons of going forward and, if appropriate, the benefits of a compromised settlement.

Let the mediator speak directly with your client. This gives the mediator a good sense of who your client is, his or her motivations, and how he or she will appear in front of a jury. Hopefully it will all be good for you, and the mediator will have firsthand information to give to the defense about the problems they face.

Do as little talking as possible unless and until you need to address a point that the mediator raises. Listen to his or her questions and concerns about your position and address those directly.

Opening statements or opening remarks in a joint meeting with all the parties are a bad idea. I do not see the benefit of them, and I see a tremendous potential for alienating folks with even the most innocent comments. It is a given that everybody is at the mediation to see if the case can be settled. Beyond that, even a simple statement can sound insincere, cement people into positions and impede discussions.

In the end, every settlement conference, like every case, is different. But thoughtful preparation and careful client counseling will go a long way toward increasing your chance of success and reducing client stress.

Conclusion

There are any number of trite sayings to describe what settlement means. For example, "You know it's a good settlement when everyone walks away unhappy" or "A bad settlement is better than a good fight." And they all have a kernel of truth. But maybe there is something more to consider.

Pretrial resolution allows the only opportunity to be creative in resolving disputes. Jurors have only one tool in their bag: money. A mediator can broker all sorts of other deals: Apologies and training are just two examples. Of course, money remains the resolution of choice in most cases, but settlement brings with it the opportunity to control the outcome, and there should be significant satisfaction in that.

Good luck.

endnotes

1. The Maricopa County Superior Court and federal District Court mediation programs may be successful and efficient as well. Because the majority of my practice is in Tucson, I feel comfortable touting the success of our courthouse, but it's not at the purposeful exclusion of others.
2. See *Sereboff v. Mid Atlantic Medical Service*, 547 U.S. ___, 126 S. Ct. 1869 (2006) (ERISA fiduciaries may use ERISA § 502(a) to enforce plan reimbursement provisions against plan participants who take possession of funds recovered from third parties that cause the injury or sickness), and *Arkansas Dep't of Human Servs. v. Ahlborn*, 547 U.S. ___, 126 S. Ct. 1752 (2006) (Federal Medicaid statutes allow states to recover only the part of third-party settlement earmarked for medical expenses). These are landmark lien cases that will change settlement strategies on both sides.
3. 2003 WL 22839795 (U.S. Tax Court 2003).